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BOUNDARY LINE

BETWEEN THE STATES OF

MARYLAND AND VIRGINIA,

BEFORE THE

Hon. JEREMIAH S. BLACK, Hon. WM. A. GRAHAM,
and Hon. CHARLES I. JENKINS,

*Arbitrators upon the Boundary Line between the States of Virginia
Maryland.*

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BETWEEN THE STATES OF

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To the Honorable Board of Arbitrators, in the matter of controversy relating to the dividing line between the States of Maryland and Virginia.

The arbitrators are to ascertain and determine the true line of boundary between the States of Maryland and Virginia: provided, that neither of the said States, nor the citizens thereof, shall by the decision of the arbitrators be deprived of any of the rights and privileges enumerated and set forth in the compact between them, entered into in the year 1785, but that the same shall remain to, and be enjoyed by, the said States and the citizens thereof forever.

It will be necessary, therefore, after the circumstances which preceded this compact have been explained, to ascertain what is settled by it, and what remains for adjustment.

BOUNDARY ON POTOMAC RIVER.

Maryland claims to oust Virginia from the southern side of the Potomac, by making good her exclusive title to the river to low water mark on the southern shore down the whole course of the river (or so much of it as is left to Virginia by her recent dismemberment), to Smith's Point, which is its south point. The grounds of claim are two: 1st. That by her charter (20th June, 1632,) she is entitled to a line: "passing from the said bay called *Dela-*

ware bay, in a right line, by the degree aforesaid," (40th,) "unto the true meridian of the first fountain of the river of *Pattomack*; thence verging towards the south, unto the further bank of the said river, and following the same on the west and south unto a certain place called *Cinquack*, situate near the mouth of the said river, where it disembogues into the aforesaid bay of Chesapeake." English translation in Bacon's Laws of Maryland. 2nd. That *therefore*, Maryland has the right to have the line, *as she now claims it*, adjudged to her.

And it is clear that unless this exclusive claim to the river be made good, Maryland cannot come to Smith's Point, and fails to establish it as the point from which her line runs across the bay to its eastern shore.

Virginia on her part denies both of these propositions, and insists that she is entitled under her charter of the year 1609, to the whole river Potomac to its low water mark on its northern shore, down to Point Lookout, which is the north point of the river, subject to the line of the new State of West Virginia; or, that she is entitled to enjoy the river to the middle of the stream, through its whole course between the two States.

To repel the claim of Maryland, and in support of her own, Virginia insists on the following propositions:

1. The Maryland charter is in its terms vague, obscure, and open to several different constructions, as will be shown. If the sense now assumed for it can be deduced from its language, it was not so understood by the king, the grantor; and proceeding, as it does, on false suggestion or misinformation, that part of it is void. *Blac. Com. B. 2, 348; Penn v. Baltimore, 1 Ves. Sr. 452.* For, 1st. Such construction contradicts the declared intent that the newly-created province "shall not henceforth be held or reputed a member or part of the land of Virginia, or of any other colony already transported, or hereafter to be transported," "from which we do separate both the said province and

the inhabitants thereof, and by these presents do will to be distinct." Sec. 21. 2nd. It contradicts the purpose declared in the grant, to people and civilize a region "hitherto uncultivated in the parts of *America*, and partly occupied by savages having no knowledge of the divine being;" a point urged with effect against this charter by Penn in his controversy with Lord Baltimore about the country now the State of Delaware, but originally embraced, as the latter contended, in his grant. 3rd. It was plainly against the interest of the king's revenues—Miscell., p. 1, No. 44, No. 46; p. 10, No. 33. 4th. It would have been against those principles of reason, humanity and necessity which make public law. The river is the great highway which Providence has established along the territory on the southern bank, in its whole extent, for those who then held it, and the generations to follow; its use for navigation and access to the sea, for mill-sites, for manufactories, for irrigation, for the sustenance of men and cattle, and countless other necessary purposes, was indispensable for its enjoyment—" *id sine qua res uti non potuit.*"

2. Virginia was the elder colony. Her charter embraced all the territory afterwards granted as Maryland, including Chesapeake Bay and all its tributaries, the Potomac included. 1 Hening's Statutes at Large, p. 88, § 6. The grant by the sovereign proprietor of the whole territory, of the part on the northern shore of the river, retained the river itself as parcel of the reserved domain. The river thereby became, at low water mark, the boundary of the newly created State; *or*, the operation of the grant was to entitle the colony and the province to hold the river "*ad filum medium aquæ.*" Hundley's Lessee *v.* Anthony, 5 Wheat, R. 374. Wheaton's Elements, (Lawrence,) 252. 3, Kent's Com., 547, (2d edit.)

Under this interpretation Virginia retained the exclusive possession and jurisdiction of the southern shore, which she held before Maryland was created, and which she has

notoriously held and exercised ever since, with the assent, approval and acquiescence of the Crown, of the successive proprietary governments of Maryland, and of Maryland since she has been a State, notwithstanding her paper resolves to the contrary.

For proof as to the King: Miscell., p. 49-52~~8~~ As to the proprietary governments of Maryland, see the several laws erecting her counties on the northern shore, bounding them by the river. "From and after the 23d of April, 1676, the bounds of St. Mary's county shall begin at Point Lookout and extend itself up Powtownmack River to the lower side of Bird's Creek," &c., and so as to other river counties. By the establishment of ports of entry on the Maryland side, and the failure to establish them on the Virginia side. Bacon's Laws. On the Virginia side, Northumberland, opposite St. Mary's, is mentioned in the Virginia laws under the name of Chicawane, *alias* Northumberland, as having been settled, and as liable for taxes in arrear in 1646, and as entitled to representation in the Assembly in 1648. 1 Hening, 337, 352. In 1653, Westmoreland was laid off above, from a named river, "and so upwards to the falls of the great river of Potomake." Id. 381. Stafford was laid off above Westmoreland, on the river, some years later. 2. Id. 239. These are the "three counties lying along the shore of that river," mentioned in the remonstrance to the King, (1684,) against Lord Baltimore's alleged usurpations. Mis. p. 48.

In 1661-2, Virginia passed a law against evasions of the tobacco duty by the people of Northumberland and Westmoreland, by reason of ships coming into the Potomac, and anchoring in Lord Baltimore's dominions, "whence they send their sloops and boats to fetch the tobacco made in this country, without paying the said imposition." 2 Hening, 132.

No question is made that Virginia granted the lands on the southern shore of the river, as her settlements extended

upwards from the south point of the river where they commenced. In 1650, (March 18,) Sir William Berkeley, the Governor of Virginia, granted Smith's Point, (529 acres,) the south point of the river, (which Maryland now claims to have then belonged to her up to high water mark,) to Samuel Smith. Maryland statement, p. 59. There was no reservation or allusion to any supposed rights of Maryland. At an early period it was declared to have been established as part of the land law, "that every man's right by virtue of his pattent extends into the rivers or creekes so farre as low water marke, and it is a priviledge granted him in and by his pattent." 2 Hening, 456. (1679.) And this right was enjoyed by the riparian owners on the southern shore, universally, and, as will be seen, is recognized as an existing right in the compact of 1785.

Virginia, during the colonial period and afterwards, exercised the right of establishing ferries over the Potomac river from shore to shore. See MacDonald's Report, in "Reports Relative to the Boundary Line," pp. 39-43. It appears that before the date of the compact of 1785, as many as twenty eight ferries, some below, some above tide, had been established, by the exclusive authority of Virginia, from her shore over the river, and none by Maryland; and after the compact, the same exercise of jurisdiction was continued.

In 1784, the Legislatures of the two States, by similar laws, conjointly incorporated the Potomac Company, to improve the river by "the extension of the navigation from tidewater to the highest place practicable in the North Branch." The Virginia law is in 11 Hening, 510. It has the recital "and whereas it may be necessary to cut canals and erect locks and other works on both sides of the river, and the Legislatures of Maryland and Virginia, impressed with the importance of the object, are desirous of encouraging so useful an undertaking;" and the enactments of the law conform with this avowed purpose. This was an

independent act of legislation by Virginia, over the whole southern shore, above the tide, without reference to any supposed right or interest of Maryland in it, and had her solemn assent.

In 1802, (1 R. C., 1819, ch. 14, p. 49,) Virginia ceded to the United States jurisdiction over so much of the lands lying on Smith's Point in Northumberland county, as might be necessary for the erection of a light-house and the appurtenant buildings thereto on the said Point, which cession was accepted by the United States, and a light-house was built, and has been maintained at the Point by a public appropriation. In 1828, (Session Acts p. 17,) she authorized the United States to purchase from the proprietors of the land lying in or adjoining Smith's Point, so much land as might be necessary for the purpose of rebuilding the light-house, altering the site thereof, and for the erection of other necessary buildings. This was done, and paid for by public appropriation; no objection having been interposed by Maryland on the ground of right of soil or jurisdiction. And it was provided that should the light-house be discontinued, the jurisdiction thereby vested in the United States should revert to Virginia.

3. Public History. "Under this head may be mentioned books and chronicles of public history, as partaking, in some degree, of the nature of public documents, and being entitled, on the same principles, to a great degree of public credit. Any approved and general history, therefore, is admissible to prove ancient facts of a public nature, and the general usages and customs of a country. But in regard to matters not of a public and general nature, such as the custom of a particular town, a descent, the nature of a particular abbey, the boundaries of a county, and the like, they are not admissible." Greenleaf on Evidence, S. 497; *Morriss v. Lessee of Harmer's Heirs*, 7 Peters 558-9; *Beverley's History of Virginia*, Book 1, § 56-57 (p. 45), Book 2, § 2 (p. 91) (1 edit. 1707); *Histoire de la Virginie*, A. Amsterdam

(1712)—ch. 4, § 3–5 (p. 72); *The Present State of Virginia*, by Hugh Jones, chaplain of the honorable Assembly, and lately minister of Jamestown in Virginia, (1724) p. 24 (Sabin's Reprints); *The History of the British Plantations in America*, by Sir Wm. Keith, Bart., p. 142 (London, 1738); *An Account of the European Settlements in America*, ch. 18 (p. 262); *An Introduction to the History of the Revolt of the American Colonies*, Chalmers 1, p. 61, 62 (Sabin's Reprints) Marshall, *American Colonies*: Bancroft 1, 243; Graham 1 V. 302.

4. The grant by Charles the Second to Lord Hopton and others, made while an exile in the first year of his reign, as he counted it from his father's death, Jan. 30th, 1649. In May, 1667, after his restoration, that grant having been surrendered, that it might be renewed with alterations, Charles granted the same territory to the Earl of St. Albans and others: "all that entire tract, territory or parcel of land, situate lying and being in America, and bounded within the head of the rivers of Tappahanock, alias Rappahannock, and Quiriongh or Pattawemeck rivers, the courses of the said rivers as they are commonly called or knowne by the inhabitants, and description of those parts and Chesapequocke bay, together with the rivers themselves, and all the islands within the bankes of those rivers, and the rivers themselves." Afterwards, Thomas Lord Culpeper, having purchased the territory, "who was thereby become sole owner and proprietor thereof in fee simple," James the Second by patent confirmed the same to him in fee simple. But these patents, though they gave ample use and enjoyment of the territory, and power to make grants of the same, reserved to the Governor, Council, and Assembly of Virginia the exclusive authority in all the military concerns of the granted territory, and the power to impose taxes on the persons and property of its inhabitants for the public and common defence of the colony, as well as a general juris-

diction over them, their heirs and assigns, and all other inhabitants of the said territory.

This great property came afterwards to Thomas Lord Fairfax, as heir of Lord Culpeper. In its upper parts, it long remained unexplored; but about 1736, disputes having arisen between Lord Fairfax and the Colonial Government concerning the boundaries at the heads of the rivers, giving rise to conflicting grants, a fruitless attempt was made to settle the matter by a boundary commission. But in 1745, the king in council, on the petition of Lord Fairfax, and the report of the Lords Commissioners of trade and plantations, decided that the true boundary of Lord Fairfax's grant, according to the terms of his patent, began at the headspring of the south branch of the Rappahannock, which is declared to be that branch of the Rapidan called the Conway; thence northwest in a straight line to the headspring of that branch of the Potomac called the Cohongoroota; the other boundaries being the rivers themselves, as they run to the Chesapeake. An act of the Virginia Assembly was passed in 1748, reciting the adjustment of the boundary of the Northern Neck, confirming all previous grants and patents of the Crown within that territory, and transferring the quitrents and services to Lord Fairfax. Chancery Patent Roll 21, Car. II. (May 8, 1667); 1 Rev. Code 1819, ch. 87, 243, (passed in 1736, in which the patents are recited;) Id. 1 V. ch. 70, 349, (passed in 1748;) Id. Appendix 2 V. 344-5; *Hunter v. Martin*, 1 Wheat, 304, Misc. 57.

In 1748, Lord Fairfax opened a land office in the Northern Neck, and continued to grant lands in this territory until his death in 1781; but at the revolution all quitrents and services for the lands were abolished, and the records of his office were transferred to the land office at the seat of government. 1 R. C. c. 91, 350. He died seised of 300,000 acres ungranted, which he devised to an alien, whose capa-

city to take was the question in *Hunter v. Martin*; but the dispute was finally composed according to the terms of an act of Assembly. 1 R. C. ch. 92, 352. Thus title to this territory became revested in Virginia, and united with jurisdiction over it, which had never been parted with.

Lord Baltimore submitted to the Hopton Grant, and his successors have submitted to what has been done in pursuance of it, without murmur or remonstrance. Maryland Statement, p. 48. The conclusions to be drawn from these transactions are: 1. That the river did not pass, and was not meant to pass by the Maryland charter of 1632, but remained part of the reserved domain of the king. 2. That even if there be expressions in the charter to that effect, of which the king was advised, the grant, under the facts and circumstances of the case, as to that part of it, is without effect.

5. The Maryland Charter. The discrepancies and obscurities in the several editions, Latin and English, as to this part of the line, will be seen on inspection. Lord Baltimore gave his translation of it, in his "Relation," and has marked the line and its continuation he claimed from Cinquack across the bay, on the accompanying map. It was this line which had to be abandoned when the Calvert and Scarburg line, hereafter mentioned, was established, and which, or something like it, Maryland seeks to restore.

But how comes the line on the bank to Cinquack, thus mapped, to be substituted now by the line of the low-water mark to Smith's Point? In the Maryland Statement (48), it is said "that in the compact of 1785, Maryland yielded the line from Cinquack, and accepted Smith's Point (five or six miles further north), as the starting of the line across the bay." But the compact, as will be seen, settled no question of boundary or property, being on its face a provisional arrangement of navigation and jurisdiction. The language of the compact is: "The citizens of each State respectively shall have full property in the shores of the

Potomac river adjoining their lands." Instead of a recognition of property in Maryland, in the southern shore, she guarantees the property of Virginia in that shore, and accepts Virginia's guarantee of property in her own.

Maryland must stand on her charter or abandon it. No mixed case can be made, of a call for the whole river under the stringent terms of her charter, and a change of claim of the southern bank down to Cinquack, for the low-water line to Smith's Point, when the difficulty of maintaining the charter line is felt.

The line in exposition of the charter is dotted on this map so as to include, not the river proper as now claimed, but one of its tributaries (the present Acquia creek), which Smith named Patomeck, and which may have been mistaken for the main river itself, which had not then been explored. The country through which, by the charter, the line was to "verge" south from the 40th degree in search of the "further bank" of the river being unknown, the line as dotted, if continued, would have cut into the heart of the colony; so the protraction of the dotted line from Cinquack across the bay to the sea, evinces a like ambitious design to attach to the Maryland province the whole river, including its mouth. Of a piece with this was the proclamation of Harvey, Governor of Virginia, in 1638, procured by Lord Baltimore, whose partisan he was, describing the province as extending "northward from the river Wiconow, commonly called by the name of Onancock, on the eastern side of the Grand Bay of Chesapeake, and northward from the *river* Chinquack, called Great Wicomico, on the western side of the said bay." Maryland Statement, 15; Instructions, id. 19. Miscell. pp. 31-37. See Bosman's History of Maryland, 2 V. 73, note, from which it would appear that the line in this proclamation was under mistake supposed to coincide with the 38th degree, which was assumed to be the boundary of Maryland on the bay, as well as on the

Eastern Shore, and it is so marked on Lord Baltimore's map. But it may be safely affirmed that not an inch of this dotted line was ever supported by occupation, or recognition by royal or colonial authority.

THE COMPACT OF 1785.

This compact, in connection with the supposed concessions in the first Constitution of Virginia, is much relied on in support of the Maryland claim to the Potomac, and especially to Smith's Point, as a point in her boundary. It regulates, provisionally, and during joint pleasure of the States, navigation and jurisdiction, on the Potomac river and "the waters of the Cheasapeake bay, and the river Pocomoke in the limits of Virginia," and no more. This appears from the terms of the compact, and the language of the Maryland resolution appointing commissioners to make it. Appendix Maryland Acts v. 7, Res. No. 1.

Its restricted character resulted naturally, from what had gone before. The dismemberment of Virginia by the erection of the colonies Maryland, Pennsylvania, and North and South Carolina, had been a ground of complaint by the elder colony. At the outset of the struggle for independence, Virginia, as a peace offering, and to allay any possible apprehension of territorial claims on her part against those States, released to them all rights which might have been claimed by her to the territories which she had lost, stipulating, however, in the case of Maryland, with whom there were open questions on the subject, for the free navigation of the Potomac and Pokomoke rivers, and her property in the shores of those rivers. This offer might have been accepted by Maryland, had it stood alone. But it was connected with a reservation by Virginia of her western and northern extent,

as fixed by her charter, meaning her territory north-west of the Ohio. To this reservation Maryland never would accede, but staid out of the confederation until the cession of that territory to the United States was made. So she rejected in resentful terms the overtures of Virginia. (Resolutions of her Convention in 1776. Documents, p. 9 Hening, vol. 10, 553-564. Maryland Bill of Rights, Nov., 1776.)

But the cession having been made, and the war successfully closed, this irritating subject could be approached in a more conciliatory spirit, and the compact which superseded all questions of boundary, and aimed only to secure the free and common use and navigation of these waters, was its fruit. It recognizes what was conceded to exist, and waives or postpones what was questioned or disputed; which is the key to its interpretation. The whole river Potomac was in dispute. Maryland claimed under her charter the whole from its source to its mouth, including the soil and jurisdiction of its southern bank, and of the Virginia shore in Northumberland county to Wicomico river; while Virginia claimed the river to its northern shore down to Point Lookout, or to the middle of the stream; and a line thence, across the bay, from one *terminus* or the other. Maryland claimed to protract the line she claimed on the Potomac over the bay to Watkins' Point. The southern boundary of Maryland on the bay was in doubt. A divisional line had been run by authority in 1668, from Watkins' Point to the ocean, over Pocomoke river, by which all the river above the line was given to Maryland, and all below it fell "within the limits of Virginia;" but the exact course of this line was in doubt; and it thus appears that as the upper part of the river belonged to Maryland, and the lower part communicating with the Chesapeake bay, (Pocomoke sound,) belonged to Virginia, it was important to secure to the upper inhabitants the navigation of the lower waters. All Chesapeake bay, from the capes to the south-

ern boundary of Maryland on the bay, (wherever that boundary might be,) belonged to Virginia.

The compact adapts itself to this state of things; and a striking feature in it, is the way in which by its terms the Potomac, which was disputed property, is discriminated from "the waters of Chesapeake bay, and the river Pocomoke within the limits of Virginia," conceded to be within the limits of Virginia. The first is the subject of mutual stipulations for the benefit of both States, (and as to navigation, for the benefit of the United States, and all in amity with them.) As to the latter, Virginia stipulates separately for the benefit of Maryland, receiving in return privileges in other waters, the property of that State.

By the fifth, sixth and seventh clauses, the two States agree that the river Potomac shall be "a common highway for the purpose of navigation to the citizens of Virginia and Maryland, and of the United States, and to all other persons in amity with the said States, trading to or from Virginia or Maryland." The entrance and clearance of vessels are provided for at some naval office on the river, "in one or both States according to the laws of the State in which the entry shall be made." Property in the shores of the river adjoining their lands, with certain defined privileges in the river, is secured to the citizens of each State, with the common right of fishery in the river under prescribed regulations.

But by the first and second clauses, Virginia separately, for the benefit of Maryland, disclaims the right (it would seem in accordance with the suggestion of the Maryland Convention, Doc. p. 9), to impose duties on vessels sailing through the capes to or from Maryland, and she agrees "that the waters of Chesapeake bay and the river Pocomoke, within the limits of Virginia, be forever considered as a common highway, free for the use and navigation of any vessel belonging to the State of Maryland, or any of its citizens, or carrying on commerce to or from said State, or

with any of its citizens.” And for the benefit of the upper inhabitants on the river Pocomoke, as for other citizens of Maryland, she agrees that “the before-mentioned parts of Chesapeake bay and Pocomoke river be forever considered as a common highway, free for the navigation of vessels from one part of the State of Maryland to another.” Maryland on her part agrees that vessels belonging to Virginia or her citizens, or carrying on commerce to or from the State, or with any of its citizens, may freely enter the rivers of Maryland as a harbor, or for safety against an enemy, without the payment of any port charge or other duty; and Virginia in the first clause reciprocates this privilege. But Virginia extends nothing to Maryland “in the waters of Chesapeake bay and Pocomoke river, within the limits of Virginia,” beyond the right of navigation; no right of property in its shores; no right of fishery; no exemption from port duties and other charges.

By the tenth clause, jurisdiction is provided for over the Potomac and the part of Chesapeake bay and Pocomoke river within the limits of Virginia; and as, according to the scheme of the compact, which pretermits the matter of boundaries, it could not be assigned by territorial lines, resort was had to the plan of giving jurisdiction over offences committed in these waters, whether certain or doubtful as to ownership, to each or both states, according to the citizenship of the offender.

An idea has been expressed, suggested it would seem by a strained verbal criticism, that the framers of the compact, when they speak in the tenth section of “that part of the bay where the line of division from the south point of Potomack river (now called Smith’s Point), to Watkins’ Point may be doubtful,” are not merely affirming that the part of the bay crossed by this supposed line may be doubtful as to ownership, but mean by this language to substitute Smith’s Point for the *Cinquack* named in the Maryland charter, and to fix Smith’s Point irrevocably as a point in

the Maryland line. But that would have been a departure from the persistent purpose of the compact. They mean only to express the same doubt as to that part of the bay as to its ownership, as they express in regard to that part of Pocomoke river "where the line of division between the two States upon the said river is doubtful." They declare that part of the bay doubtful, and could not mean that the asserted line over it, either as to *termini* or direction, appeared to be and was certain. They make no allusion to *Cinquack*, and merely speak of the north point of the river by the name it had acquired—"now called Smith's Point."

Conclusions: 1. That the property line on the Potomac, and from its mouth to the Eastern shore, remains unadjusted. 2. Part of the waters of Chesapeake bay, and part of the Pokomoke river, are exclusively within the limits of Virginia. 3. By the Calvert and Scarburg agreement, a divisional line between the States was run over Pokomoke river, but "the line of division between the two States on that river," was treated as doubtful. (It is made clear by Michler's Survey.)

BOUNDARY LINE ON THE EASTERN SHORE AND CHESAPEAKE BAY.

Virginia claims by the line from Chesapeake bay to the sea, as she insists it was established in 1668 by Calvert and Scarborough; and as it appears by the survey of Michler, made under the joint instructions of the commissioners of the two States, Lee and McDonald, in 1859. Michler's Report and Survey; Calvert & Scarborough Agreement (Maryland statement, p. 37).

The binding authority of this agreement has never been disputed, unless the present claim of Maryland is to be so interpreted: a line "from the centre of Cedar straits, *near*

the southern end of Watkin's point; thence by a right line to the Atlantic ocean." The act of Maryland, however, which invited this investigation (ch. 385, March 1860), while it insists on an interpretation of the agreement which Virginia contests, does not deny but distinctly asserts its authority. But the agreement was authorized and ratified by both colonies and approved by the king.

1. The line as laid down by Michler and insisted on by Virginia, conforms with the language of the agreement. Watkin's Point being ascertained to be "the point of land made by the north side of Pocomoke bay and south side of Annemessex bay," the commissioners say: "we have run an east line agreeable with the extremest part of the westernmost angle of the said Watkin's Point" "*over* Pocomoke river, near Robert Holston's," and "*over* Swansecute creek into the marsh of the seaside." Omitting from the passage quoted the words descriptive of marking the line near Holston's house, and attending to the words descriptive of running the line (the two have no necessary connection), the sense is too plain to be obscured. They say, they *have run* a line—an east line—*over* Pocomoke river to the land near Robert Holston's, agreeable with, that is, which agrees, concurs with, the extremest part of the westernmost angle. There could be no reason for this particular reference to "the extremest part" but to make it the beginning point of the line which should divide the disputed territory. The line is declared to run through the whole, from the bay to the sea; and is to be "received as the bounds of Virginia and Maryland on the eastern shore of Chesapeake bay." It is the *marking* of the line which begins east of the river and is continued eastward.

2. No other construction is consistent with the object of the commission, which was to divide between the colonies the whole eastern shore territory lying between the bay and the ocean. This territory, which had been the sole property of Virginia, was to be divided, according to the

Maryland charter, by a "*right line* drawn from the promontory or headland called Watkin's Point," "beside the bay aforesaid on the west, as far as the great ocean on the east;" up to which line the colonies would thenceforth hold respectively. A line through the whole territory was therefore indispensable. To have run it only from Pocomoke river eastward, would have left the territory between the river and the bay still in dispute, and have left Maryland without any closing and initial point on the bay.

3. Had the line established by the agreement been an arbitrary one, yet as it was authorized and accepted by both colonies and approved by the king, it would have been conclusively binding. But it was not so. The southern boundary of Maryland, on the eastern shore, though it is not so expressed in the charter was, and is, the thirty-eighth degree of north latitude. Letter from the King to Lord Baltimore, appended to Reports of 1872, p. 93. So it is described by Lord Baltimore on the map published with his Relation; and is indeed a settled point in geography. The commissioners ran the line accordingly. Michler's Report (see Reports, pp. 9, 13).

4. This construction is supported by the terms of the Compact of 1785, which expressly recognizes part of the Pocomoke river as being "within the limits of Virginia" though "the line of division between the two States upon the said river is doubtful." Section 10. The line here referred to is the Calvert and Scarborough line, run "over" Pocomoke river; for there was no other.

5. The continuation of the line from "the extremest part of the westernmost angle of Watkin's Point" over Smith's Island to the mouth of the Potomac, either to Point Lookout, or by the 38th parallel, is put beyond question by the evidence, though its establishment by any formal act of public authority cannot be proved. It is shown by the evidence of tradition, popular usage, and public acts of both sides in this controversy, such as grants of land by

each on the island recognizing the line of division between them, the collection of taxes by both, a commission under the election law of Maryland, by which an election district was laid off of so much of the island as lies in that State, and judicial decisions of the courts of that State, in cases of violation of her oyster laws, which recognize the divisional line on Tangier Strait between Watkin's Point and the island, to be as Virginia contends it is.

6. The line which Maryland claims seems to be undefined and uncertain. In her act, ch. 60, (passed March 20th, 1852,) it is affirmed that it "has, from lapse of time, become uncertain." In her act, ch. 385, (passed March 1860,) it is affirmed "that the true divisional line across Chesapeake bay is the *southernmost*" (not the westernmost) "angle of the body of land defined by the aforesaid commissioners as Watkin's Point." And now her pretension is, a right line from Smith's Point "to the centre of Cedar Straits, between Pocomoke sound and Tangier sound, *near* the southern end of Watkin's Point, thence by a right line to the ocean." These lines are irreconcilable with each other. Both violate the agreement of 1668, in that neither of them protracted east to the ocean, would touch at any point the part of the line east of Pocomoke river to the sea, which both sides agree was established by that agreement; nor would a right line run east from the centre of Cedar Straits touch Pocomoke river, but would intersect the open Pocomoke sound several miles below the mouth of the river. Either line so protracted would unsettle and displace that part of the line which has, by concession of both sides, been known and respected as a fixed boundary between them for nearly two centuries. Moreover, it would divide between the States, "the waters of Chesapeake bay and the river Pocomoke within the limits of Virginia," admitted to be her rightful possession, until questioned in this controversy. These lines are unsupported by any evidence of occupation, or recognition or monuments.

Some criticism has been attempted upon the apparent failure of the commissioners in 1668 to mark the line west of Pocomoke river. It is inferred, in the face of their plain language, and the object of their appointment to the contrary, that they did not run the line from "the extremest part of the westernmost angle" at all, but only so much of it as they marked with marked trees. The inference is illogical. There may have been reasons for this omission, which now can only be conjectured. The territory was marshy, difficult of access, probably bare of woods, and thinly settled if at all. The "extremest part" of the cape or headland was a plain and visible object, being then more prominent than now—"a point running out from the highland of James' Island"—and, "agreeable" with this, it was easy to run the line over Pocomoke river."

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